Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

STAFF SERGEANT GREGORY A. DALE,
PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

Petition For a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

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Counsel of Record

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November 1997

1888

QUESTION PRESENTED

Whether the military judge's improper invasion of sentencing deliberations was contrary to Article 39(b), Uniform Code of Military Justice [10 USC § 839b], as well as fundamental notions of due process, and gave rise to a non-verbatim record of trial.

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The petitioner, Staff Sergeant Gregory A. Dale, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case, issued on 11 September 1997.

OPINIONS BELOW

The order and summary judgment of the United States Court of Appeals for the Armed Forces, reported at No. 94–0325,__MJ__ (11 September 1997), is located at Appendix A. The unpublished opinion of the United States Air Force Court of Criminal Appeals, *United States v. Dale*, ACM 29794 (AFCCA 8 April 1997), is located at Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on 11 September 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259 (3) (West Supp. 1996) and 10 U.S.C. § 867(a) (West Supp. 1996).

STATEMENT OF THE CASE

On December 30, 1991, Petitioner was tried by a general court-martial. Pursuant to his pleas, he was convicted of rape, sodomy, and committing indecent acts on a child (2 specifications), in violation of Articles 120, 125, and 134, Uniform Code of Military Justice, 10 USC §§ 920, 925, and 934, respectively. The Petitioner was sentenced to a dishonorable discharge, 20 years confinement, forfeiture of all pay and allowances, and reduction in rank. Subsequently, on March 10, 1992, the convening authority approved the findings and, pursuant to a pretrial agreement, only so much of the sentence as provided for a dishonorable discharge, 20

years confinement, forfeiture of $392.00 pay per month for 240 months, and reduction in rank.

On September 14, 1995 the United States Court of Appeals for the Armed Forces found that the Petitioner was denied a trial, fair in both fact and appearance, because the deputy chief of security police at Altus Air Force Base was permitted to sit as a member of the court-martial which sentenced the Petitioner. The sentence originally approved was set aside and the record was returned to the Judge Advocate General of the Air Force. A sentencing rehearing was held on February 2, 1996, before a court-martial consisting of officer members. The members adjudged 10 years confinement, a reprimand, a dishonorable discharge, forfeiture of $392.00 for 120 months, and reduction to Airman Basic. The convening authority approved the sentence on May 29, 1996. The Air Force Court of Criminal Appeals affirmed the findings and sentence on April 8, 1997. (Appendix B). The Court of Appeals for the Armed Force granted review and summarily affirmed the lower court's decision on 11 September 1997. (Appendix A).

The facts pertinent to the question presented are drawn from the record of the retrial on sentence. Two hours after sentencing deliberations began, the military judge called an Article 39(a) session. He disclosed that he had talked to the members while they were deliberating (R. 149). He stated that the bailiff had told him that the members had a question. As a result, he put his head inside the deliberation room and asked the court president what the question was (R. 149). The military judge indicated that the question was whether the sentences run concurrently or consecutively (R. 150). The military judge explained that all punishments ran concurrently. He also explained that confinement was the only punishment that would be executed immediately after adjudged. During the Article 39(a) session, out of the

presence of the members, he recalled the conversation and inquired as to any possible objections from counsel. No objections were made.

REASON FOR GRANTING THE WRIT

WHEN THE MEMBERS OF A COURT-MARTIAL DELIBERATE OR VOTE, ONLY THE MEMBERS MAY BE PRESENT. ALL OTHER PROCEEDINGS, INCLUDING ANY OTHER CONSULTATION OF THE MEMBERS OF THE COURT WITH COUNSEL OR THE MILITARY JUDGE, SHALL BE MADE A PART OF THE RECORD AND SHALL BE IN THE PRESENCE OF THE ACCUSED, THE DEFENSE COUNSEL, THE TRIAL COUNSEL, AND IN CASES IN WHICH A MILITARY JUDGE HAS BEEN DETAILED TO THE COURT, THE MILITARY JUDGE.

Article 39(b), UCMJ (MCM, 1995 Ed.). RCM 1006 (b) states that, "Only the members shall be present during deliberations and voting." "There is no doubt that error results when a law officer—without the accused and counsel—enters a closed session during which the court-martial is deliberating on sentence." *United States v. Allbee*, 5 USCMA 448, 490, 18 CMR 72, 74 (1955). This is so even though the military judge may be merely entering to pass on the form of the proposed sentence. *United States v. Miskinis*, 2 USCMA 273, 8 CMR 73 (1953). It is presumed that this error is prejudicial. *Allbee, supra.*

In *Allbee* the Court held that this presumption of prejudice was overcome by the fact that "every possibility of harm to the accused was refuted by the circumstance that the sentence originally settled on by the Court...was more severe

than that ultimately announced." *Id.* at 76. The Court also noted, that the sole topic of the "closed conference" was as to forfeitures, which were not included in the sentence.

In the present case, the Air Force Court of Criminal Appeals found that although the military judge's conduct was contrary to Article 39(b) and *Allbee*, the presumption of prejudice had been rebutted by the judge's full disclosure on the record, the lack of objection, and the accuracy of the advice. *See, United States v. Dale* (A.F.Ct.Crim.App., April 8, 1997)(Appendix B).

Despite the military judge's best efforts to accurately recollect and reiterate the advice he gave to the members, we cannot be certain that his recitation was complete and accurate. The Court reporter was not present to record the conversation. The members were not present during this recitation. They, of course, were in the best position to evaluate the accuracy of the judge's recollection of the discussion. With a matter of such significance, the members should have been present to assure that the information injected into their deliberations was accurately reflected on the record. This same precaution is taken when the judge holds a conference with the parties off the record. RCM 802 (MCM, 1995, Ed.). In such a situation the military judge ordinarily recites the matters addressed at the conference on the record and in front of the parties. In this way the parties can clarify, add to, or object to the judge's recollection of the conference. Defense counsel didn't have the factual knowledge to object to the content of the judge's recitation of what he advised the members.

The military judge's instruction that "all [sentences] run concurrently" was not totally accurate. Hard labor without confinement can run consecutively with confinement. RCM 1003(b)(7).

Here we don't know what sentence was contemplated prior to the military judge's instruction. Before the Air Force Court, the Government argued that it is "clear" from the hypothetical posed to the military judge, that the members were considering "whether additional punishment, such as a hard labor without confinement or a reprimand, would be useful to Appellant's rehabilitation." This is speculation. However, if that were true, then the members must have been considering "hard labor without confinement" as a portion of the sentence. The members may also have been thinking of this instead of extra time in confinement. If that is so, then the fact that after hearing the military judge's instruction they decided to give hard labor with confinement alone, supports that the judge's instructions did have an impact on the sentence. Simply put, we don't know how that sentence was impacted, all we can do is guess. In this case every possibility of harm to the accused was not refuted by the circumstance. The presumption of prejudice is not rebutted.

Article 54, UCMJ [10 U.S.C. § 854] requires that a complete record of the proceedings and testimony shall be prepared in each general court-martial case in which the sentence adjudged includes a discharge or any other punishment exceeding what may be adjudged by a special court-martial. Rule for Court-martial 1103(b)(2)(B) provides that a complete record shall include a verbatim written transcript of all sessions except sessions closed for deliberations and voting. The Discussion to this rule states that "the verbatim transcript includes all proceedings including sidebar conferences, arguments of counsel, and rulings and instructions by the military judge..." RCM 1103(b)(2)(B) is based on Article 54(c). *See*, App. 21, RCM Analysis, A21–77.

A complete or verbatim transcript may include insubstantial omissions. *United States v. McCullah*, 11 MJ

234 (CMA 1981). However, substantial omissions render a record nonverbatim. *United States v. Gray*, 7 MJ 296, 298 (CMA 1979) (failure to record a side bar conference on the admissibility of evidence is a substantial omission). The failure to record fully a ruling by the military judge that affects the substantial rights of an accused is a substantial omission. *United States v. Barney*, 23 MJ 504, 505 (AFCMR 1986) (testimony concerning a jurisdictional challenge must be recorded verbatim). *See United States v. Sturdivant*, 1 MJ 256, 257 (CMA 1976) (court reporter's failure to record sidebar conference on challenges was error even when challenges were summarized). This was a substantial omission that renders the record non-verbatim under Article 54. The presumption of prejudice was raised due to this substantial omission. *See, United States v. Cudini*, 36 MJ 572 (ACMR 1992); *United States v. Johnson*, 33 MJ 1017 (ACMR 1991), *pet. denied*, 36 MJ 76 (CMA 1992). This presumption was not overcome.

CONCLUSION

The petitioner was granted a rehearing on sentence because he did not receive a fair trial. Unfortunately, even now after a second hearing on sentence, the petitioner still has not received a fair trial. The military judge violated Article 39(a), UCMJ by invading the members' sentencing deliberations. Every possibility of harm as a result of the military judge's advice to the members during that interruption cannot be refuted by the circumstances here. Further, the military judge's actions resulted in a substantial omission from the record, rendering it non-verbatim under Article 54, UCMJ.

The petition for a writ of certiorari should be granted.

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November 1997

APPENDIX A

UNITED STATES, Appellee,

v.

Gregory A. DALE,
U.S. Air Force, Appellant.

USCA Dkt. No. 94–0325

Crim.App. No. 29794

U.S. Court of Appeals for
the Armed Forces.

Order

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Criminal Appeals, it is by the Court this 11th day of September, 1997,

ORDERED:

That said petition is hereby granted; and

That the decision of the United States Air Force Court of Criminal Appeals is affirmed.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (OVERLY)
Appellate Government Counsel (DUBRISKE)

APPENDIX B

UNITED STATES AIR FORCE
COURT OF APPEALS

UNITED STATES

v.

Staff Sergeant GREGORY A. DALE, FR502–64–0085
United States Air Force

ACM 29794 (reh)

8 April 1997.

Sentence Adjudged 2 February 1996 by GCM convened at Altus Air Force Base. Oklahoma. Military Judge: Dennis E. Kansala

Approved sentence: Dishonorable discharge, confinement for 10 years, forfeiture of $392 pay per month for 120 months, a reprimand, and reduction to E-1.

Appellate Counsel for Appellant: Colonel David W. Madsen, Lieutenant Colonel Kim L. Sheffield, and Captain Marge A. Overly.

Appellate Counsel for the United States: Colonel Theodore J. Fink, Lieutenant Colonel Michael J. Breslin, and Captain Steven D. Dubriske.

Before

PEARSON, MORGAN, C.H., II, and MORGAN, J. H.

Appellate Military Judges

UPON REHEARING

PEARSON, Senior Judge:

We are reviewing this case for the second time. On November 1, 1993, with one judge dissenting, we affirmed both appellant's general court-martial conviction for sexually abusing his natural daughter and his sentence to a dishonorable discharge, 20 years confinement, total forfeiture of pay and allowances, and reduction to airman basic. 39 M.J. 503 (A.F.C.M.R. 1993). However, on September 14, 1995, the Court of Appeals for the Armed Forces reversed our decision as to the sentence, finding that appellant was denied a fair sentencing hearing, 42 M.J. 384 (1995).

At a rehearing on the sentence, court members imposed a dishonorable discharge, 10 years confinement, forfeiture of $392 monthly pay for 120 months, a reprimand, and reduction to airman basic, which the convening authority approved. Now for the first time, appellant claims the trial judge erred during the rehearing by entering the court members' closed session deliberation to answer a question. We agree the judge erred, but find appellant was not materially prejudiced. *See* Article 59(a), UCMJ, 10 U.S.C. § 859(a).

THE INTRUSION

While the court was in sentencing deliberation, the bailiff informed the trial judge that the members had a question. Rather than convening a formal session of court to deal with the issue, the judge "put [his] head in the deliberation room and asked the court president, Colonel DeLuca, what the question was." The president wanted to know "whether sentences run concurrently or consecutively." The judge replied that all punishments "run concurrently" but confinement was the only one which would "start today if that was imposed." The judge advised that other punishments would not begin until approved by the convening authority after a record of trial was prepared, and if the accused was in confinement at that time, punishments such as restriction and

hard labor without confinement would essentially be "punishments that would never be carried out."

After answering the question, the trial judge convened a hearing and informed counsel and appellant in detail of his conversation with the members to see if "either side ha[d] any real 'heartburn' "—they didn't. Appellant remained *sans* heartburn until now when he claims the record of trial is not verbatim due to the judge's unrecorded *ex parte* conversation with the members.

DISCUSSION

Only the members may be present during their sentencing deliberations. All other proceedings, including any other consultation of the members with counsel or the military judge, shall be in the presence of all counsel and the accused. Article 39(b), UCMJ, 10 U.S.C. § 839(b). Violation of this statutory prohibition creates a rebuttable presumption of prejudice. *United States v. Allbee*, 18 C.M.R. 72 (C.M.A. 1955).

Here, we conclude appellant suffered no harm and the presumption of prejudice is rebutted. First, the military judge made full disclosure to all counsel and appellant immediately following the discussion and appellant did not enter an objection. Second, the military judge's advice to the members was technically correct when this trial occurred. *See United States v. Pedrazoli*, 45 M.J. 567 (A.F. Ct. Crim. App. 1997) (effective date of some punishments changed after April 1, 1996). We cannot see any possible prejudice to appellant in

this case due solely to the judge's *ex parte* conversation. *See Allbee*. However, we agree that *ex parte* conversations between judges and court members detract from the appearance of fairness and impartiality in our justice system—judges should avoid them, reversible error or not.

The record used to support a sentence of confinement exceeding 6 months, forfeitures or a fine exceeding two-thirds pay per month for 6 months, or any punitive discharge, must be a complete and verbatim transcript of all sessions except those closed for deliberation and voting. R.C.M. 1103(b)(2); *United States v. McCullah*, 11 M.J. 234 (C.M.A. 1981). However, the government does not have to supply a perfect transcript to fulfill this duty. To be complete, the record need only reflect an accurate account of the essential substance of the proceedings. *United States v. Whitman*, 11 C.M.R. 179 (C.M.A. 1953). Likewise, to be considered verbatim, the record need not reflect word-for-word accuracy; rather, the record will pass muster as long as it is substantially verbatim. *United States v. Gray*, 7 M.J. 296 (C.M.A. 1979).

Insubstantial omissions do not destroy the complete and verbatim character of the record. Substantial omissions, on the other hand, create a rebuttable presumption of prejudice. *McCullah; United States v. Thorn*, 36 M.J. 955, 961–62 (A.F.C.M.R.), *pet. denied*, 38 M.J. 226 (C.M.A. 1993). When any omission occurs, the parties may reconstruct the record where possible, and the reconstruction may be so meticulous that the record becomes substantially verbatim in spite of the omission. *United States v. Lashley*, 14 M.J. 7 (C.M.A. 1982); *United States v. Eichenlaub*, 11 M.J. 239 (C.M.A. 1981).

Thus, in determining whether an omission renders a record of trial either incomplete or nonverbatim, we use a two-step analysis. First, we determine if an omission was substantial, either qualitatively or quantitatively. If it was, we

then determine if the government has rebutted the presumption of prejudice. *Lashley*.

Here, using the first step, we conclude that any sentencing instructions concerning the effective dates of punishment and whether one punishment would in reality supplant another is qualitatively substantial. Thus, we proceed to presume prejudice, and find it rebutted. The military judge immediately reconstructed his instructional session with the members, and offered counsel an opportunity to object. Absent timely objection, we find the reconstruction provides a substantially verbatim record. In this regard, appellant's two defense counsel were not bumps on a log during the reconstruction. If they were dissatisfied with the completeness or accuracy of the judge's reconstruction, they could've entered their objection then. *Cf. United States v. English*, 50 C.M.R. 824 (A.F.C.M.R. 1975) (reconstruction of record rebutted presumption of prejudice even where defense counsel objected to it).

However, we do not leave this case without reminding trial judges that procedural shortcuts at trial to save a few minutes may bog the case down on appeal for months, even years, and needlessly burden the appellate process. Because of the plain error doctrine, the trial judge may not always take solace in the fact that no one objects to the shortcut at trial. *See United States v. Olano*, 507 U.S. 725 (1993) (plain error doctrine). Moreover, some things, like a verbatim record, may not be waived. *See United States v. Whitney*, 48 C.M.R. 519 (C.M.A. 1974).

CONCLUSION

The findings and sentence are correct in law and fact, the record of trial is complete and verbatim, and no error

prejudicial to appellant's substantial rights occurred. Accordingly, the findings and sentence are

AFFIRMED.

Judges MORGAN, C.H., II, and MORGAN, J.H. concur.

OFFICIAL

LAURA L. GREEN
Clerk of Court